Supreme Court
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No. 95-771

# In the Supreme Court of the United States

OCTOBER TERM, 1995

FORD MOTOR COMPANY, *Petitioner*

*v.*

DEE-WITT C. SPERAU AND SAMUEL R. FOSTER, II,
*Respondents*

**On Petition for a Writ of Certiorari to the Supreme Court of Alabama**

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

In an effort to portray Ford's conduct in this case as sinister, respondents have taken evidence out of context, misrepresented facts, and made assertions that have no support in the record. Even if every word they say were true, the facts would fall far short of justifying the enormous punishment inflicted on Ford in this case. In fact, when the smoke they have thrown up is cleared away, it becomes clear that Ford was punished $6 million for failing to discourage respondents from purchasing a profitable dealership because Foster is black. If the Due Process Clause provides any protection from arbitrary and excessive punitive exactions, the present case cries out for its invocation.

## REPLY STATEMENT OF FACTS

Respondents attempt to spin a yarn of "intentional fraud" from snippets of innocent facts taken out of context, distortions of the record, and unsupported assertions. The record simply does not support their efforts to make something that was entirely benign look nefarious, or to make a case that is in reality quite straightforward look as though it had disqualifying factual complexities.[1]

1. *Ford's efforts to increase the number of minority-owned dealerships.* The central strand of respondents' theory of "intentional fraud" is the entirely admirable fact that Ford had committed to increasing the number of minority-owned dealerships. See Opp. 1-3. Respondents insinuate that Ford was so intent upon achieving this laudable goal that it created incentives for its employees to do and say anything to increase the number of black-owned dealerships. The record refutes that implication. Although Ford has long impressed upon its personnel the desirability of increasing the number of minority-owned dealerships and even established objec-

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[1] Space constraints prevent us from correcting all of respondents' numerous misleading references and unsupported assertions. The many that we do correct demonstrate that the remaining factual assertions should be regarded with a healthy skepticism.

tives[2] that could be a factor in performance evaluations, there is no evidence whatever that any employee ever felt pressured to mislead a prospective dealer or to appoint a minority dealer who was destined to fail. To the contrary, the record is unequivocal that neither Ford nor its employees have any incentive to encourage the appointment of a dealer (whether black or white) who is unlikely to succeed. R. 1448, 1543-1544, 1653-1654, 1746-1747, 1808-1809, 1954-1955, 2286, 2288. When a dealership fails, Ford experiences substantial, unrecoverable costs in terms of foregone sales, loss of customer goodwill, loss of market share, and the expense of obtaining a replacement dealer. R. 1477-1478, 1544, 1808, 2239-2242, 2286. Relatedly, it is not a plus for the career of a Ford employee to facilitate appointment of dealers (whether white or black) who ultimately fail. R. 1809, 2448.

2. *The Equal Opportunity Progress Reports*. As they have throughout this case, respondents invoke isolated passages from Ford's Equal Opportunity Progress ("EOP") Reports in an effort to imply that Ford management knew that minority-owned dealerships were destined to be unsuccessful, yet nonetheless committed to increasing the number of such dealerships. See Opp. 2-3. These reports, like Ford's goal of increasing the number of minority-owned dealerships itself, are the model of admirable corporate behavior, not "smoking-gun" evidence of an egregious scheme to defraud. Read in their entirety (rather than in isolated snippets as respondents prefer), the reports reflect an on-going process of setting objectives, monitoring their progress, and reporting that progress to the board of directors.[3]

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[2] The assertion (Opp. 5) that the Atlanta Sales Office was assigned a "quota" is false. Kitchens testified that the office had an "objective" of 12 minority-owned dealerships; he expressly rejected the suggestion that this was a "quota." R. 1883-1884.

[3] The EOP Reports reflect that the goal of increased numbers of minority-owned dealerships was in substantial part a result of constructive

The EOP Reports also set forth the support programs that Ford makes available in order to assist minority dealers. C. 4688-4690, 4712-4713. These include the Dealer Development program (see Pet. 3-4), which Ford makes available to candidates who either cannot raise sufficient capital to purchase a dealership outright or who are forecast to experience losses during the first year of operations. C. 4689, 4712. Under that program, Ford "absorbs any losses while the dealer's investment is held in escrow." *Ibid.* The reports reflect that, in a given year, over half of the minority-owned dealerships receive benefits under this program. See, *e.g.*, C. 4709 (119 black dealers as of July 1986); C. 4712 (66 black-owned dealerships received funds under the program). The reports reflect that, overall, Ford spends roughly $50 million per year on its Minority Dealer Program. C. 4690.

The EOP Reports do, of course, contain data on the performance of black-owned dealerships as a group.[4] As respondents studiously ignore, however, the data are group averages for *all* black-owned dealerships, including the more than 50% annually that receive assistance through the Dealer Development program. When the employees responsible for

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meetings with existing Ford minority dealers. See, *e.g.*, C. 4682 ("[A] series of meetings were held with the Black Ford and Lincoln-Mercury Dealer Association. As a result of the sessions, [Ford] agreed to accelerate its black dealer count objectives for 1985 and establish long term goals."). This fact alone undermines the suggestion that, in attempting to increase the number of minority-owned dealerships, Ford was engaged in some kind of deliberate fraud.

[4] The data are not by any means uniformly discouraging. For example, the reports reflect that, based on results for the first eight months of 1987 (the year before respondents purchased the assets of the Selma dealership), 71 black dealers were expected to earn profits of over $100,000 in 1987 — up from 6 in 1982. Twenty-one of these dealers were expected to earn over $500,000 and one was expected to earn over $2 million. C. 4739. Needless to say, respondents did not complain about the non-disclosure of these *encouraging* statistics.

preparing the EOP Reports reviewed data for private capital dealers alone (the category relevant to respondents), they found and reported that black private capital dealers had not performed materially differently from the overall dealership body. See C. 4738.

Respondents emphasize (Opp. 3) that the EOP Reports also contain conclusions that *new* black dealers, *as a group*, are marginally profitable and observations about why this is so. Here again, the reports do not differentiate between private capital dealers and dealer development operators. Given that the Dealer Development program was used for dealerships that were projected to lose money in their first year, however, the statements in the reports are both entirely unsurprising and entirely irrelevant to respondents' case. The irrelevancy is further confirmed by the particulars of respondents' situation. For example, the reports observed that, among other things, newly appointed minority dealers "typically experience a high initial turnover of people" and "have experienced difficulty in attracting qualified management personnel." C. 4711. This concern manifestly did not apply to the Selma dealership whose staff, including the highly experienced general manager, committed to staying on. R. 492-493, 1605-1606. The reports also observed that many black dealers face disadvantages because of geographic location. C. 5310. This observation, which relates to the fact that many Dealer Development dealerships are located in low-income areas where it is difficult to generate large sales quickly, had no application to Foster and Sperau, who were purchasing the assets of a dealership with a history of profitability. See R. 440-441, 1598, 1603-1604, 1699-1700.[5]

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[5] The reports also mention higher fixed costs as being a problem for many new black dealers. As with the other factors, there was no evidence that this problem afflicted River City Ford. Not surprisingly, respondents ignore the one explanation for their problems that *is* supported by the record — their extravagant diversion of dealership funds (see Pet. 11-12).

3. *The "vast majority" claim.* Respondents assert (Opp. 3-4) that Ford was able to continue appointing black candidates in the face of "the dismal experience of black dealers" only by misrepresenting the profitability experience of minority dealers. In particular, respondents claim (*id.* at 4) that Kitchens misrepresented to them that "the vast majority of Ford minority dealers were making money." There is no evidence, however, either that Kitchens and the other employees involved in appointing dealers had access to the EOP Reports or that Ford management ever instructed those employees to misrepresent anything in order to sign up a minority dealer. Moreover, the reports reflect that in 1987, the last year for which data were available prior to respondents' acquisition of the dealership, 77% of all black-owned dealerships and 89% of black-owned private capital dealerships were profitable. C. 4738. Thus, the alleged representation that the "vast majority" of black-owned dealerships were making money was *true*. Indeed, although respondents ignore it, the trial court directed a verdict against them on this aspect of their misrepresentation claim. R. 1429.

4. *The assertion that the sales and profit forecast and capitalization requirement were "intentionally misleading."* Respondents assert that "Ford management manipulated the sales and profit forecast and capitalization requirement" to induce them to purchase the Selma dealership. Of course, Kitchens — a district market representation manager who reported to the assistant district manager who in turn reported to the district sales manager who in turn reported to the regional manager for the Atlanta region (R. 795-797) — is hardly "Ford management." Moreover, as we pointed out in the petition (at 7-8) and as respondents tellingly ignore, Kitchens explained to Sperau in detail his reasons for changing the capitalization requirement and projected return on capital. Sperau then independently verified the bases for Kitchens' figures. *Id.* at 8.

Respondents contend (Opp. 5-6) that the sales and profit forecast and capitalization requirement "were intentionally misleading" because Ford's internal guidelines reflect that private capital dealerships should have $350,000 in unencumbered capital. That contention, of course, has nothing to do with the race-based theory upon which the case was tried and the jury was instructed. Moreover, it suffers from the same basic flaw as respondents' race-based arguments: it is based on a generality. Although many dealerships require $350,000 or more in unencumbered capital because of their size, there is no evidence that a dealership of the size of *River City Ford* requires unencumbered capital of as much as $350,000.

Shifting back to their race-based arguments, respondents assert (Opp. 6-7) that Dr. Carter's data support the conclusion that "Ford used intentionally misleading sales and profit forecasts to lure black dealer candidates to acquire Ford dealerships in less desirable locations." This contention is absurd given respondents' failure to adduce even a shred of evidence about what kind of sales and profit forecasts were given to other black prospective dealers in other circumstances. Moreover, here again respondents rely on the assumption that generalized data and observations are applicable to individual dealership candidates.[6] In this case there was no evidence that River City Ford was in an undesirable

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[6] As explained in detail by a Ford employee who was intimately involved in preparing the EOP Reports, Dr. Carter's data and conclusions, in addition to being entirely irrelevant to respondents, were based upon manifestly false information regarding the number of black dealers that went out of business each year. R. 1738-1745, 2291-2292, 2325-2327. This testimony was supported by a Ford Vice President (R. 2450-2451) and by Mel Farr, the Chairman of the Ford-Lincoln Mercury Black Dealers Association (R. 2430). Although one could not tell it from respondents' out-of-context quotation (Opp. 20), Farr testified passionately in favor of Ford and against the race-based theory of liability upon which respondents' $6 million punitive windfall is predicated, observing that such a theory is inimical to the goal of increased opportunity for black entrepreneurs. See R. 2390-2434.

location. To the contrary, the evidence was that Selma had been a profitable location for the prior dealership.[7]

In short, there is not a stitch of evidence in the record that Kitchens (let alone Ford management) deliberately misrepresented the capitalization requirement and projected return on capital in order to induce respondents to purchase the dealership.

## ARGUMENT

### A. The Notice Issue

1. Respondents contend (Opp. 10-11) that Ford waived this argument by acquiescing in the punitive damages instruction. But there was no reason to object, for the instruction *correctly* stated the "intent to injure" requirement. The failure to object to a correct instruction cannot possibly waive the claim that the Alabama courts retroactively abandoned the standard for punitive liability articulated in that instruction, thereby depriving Ford of its right to fair notice that its conduct could be subject to punishment.

2. Respondents characterize Ford's argument as merely an attempt to relitigate the Alabama courts' sufficiency determinations. Opp. 11. They are mistaken. Ford's argument is that the Alabama courts have retroactively eliminated an indispensable element of the claim for punitive damages — the "intent to injure" requirement. If the Alabama Supreme Court had identified evidence that it considered to support a finding of intent to injure, Ford would have no federal constitutional claim. But because the court instead simply

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[7] It is undisputed that the prior dealership earned over $250,000 in profits in the year before it was sold to respondents. R. 440-441, 1598, 1699-1700. Respondents' representation (Opp. 4 n.3) that the dealership was not making any money (based on Sperau's uncorroborated assertion about the state of affairs after the dealer died) is thus grossly misleading. So too is the related statement (*id.* at 4) that "Ford management was desperate to find a full time dealer as quickly as possible." See R. 1618.

equated the intent to induce reliance with the intent to injure, thereby reading the latter out of Alabama's punitive damages statute, Ford does have a notice claim.

3. Respondents quote at length from the trial court's *Hammond* order in an effort to create the impression that there was indeed evidence of an intent to injure. See Opp. 12-14. But, as their failure to cite a single page from the record reflects, there simply was no such evidence in this case.[8] The quotations from the *Hammond* order simply confirm that the Alabama courts have read the intent to injure requirement out of Alabama law by equating it with the intent to induce reliance.

**B. The Excessiveness Issue**

1. Respondents suggest (Opp. 14-15) that *BMW* can have no conceivable bearing on Ford's petition because the punitive damages in this case do not bear the same high ratio to the compensatory damages as in *BMW*. However, as the petitioner in *BMW* points out in its merits brief (at 31-32), just as a high ratio does not always require the conclusion that a punishment is excessive, a low ratio is not enough to immunize a multi-million dollar punishment that bears no relationship to the gravity of the defendant's misconduct. Accordingly, if the Court reaches the excessiveness issue in *BMW*, its reasoning could well bear on the disposition of Ford's petition.

2. Respondents contend (Opp. 15) that Ford has "minimize[d] the gravity" of its alleged misconduct. According to respondents, Ford knew that new dealers as a group are only marginally profitable but nonetheless deliberately projected for them a highly optimistic return on capital. In making this

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[8] For example, the trial court's statement (see Opp. 13) that "Ford management was telling its Board of Directors that it expected these same new black dealer candidates would be black loss dealers" is entirely unsupported by the record.

argument, respondents are seeking to rely on a theory that formed no part of their complaint at trial. Respondents simply did not ask that Ford be punished for "suppressing" facts about the success rates of new dealers or claim that it was this omission that constituted the fraud. Rather, their evidence and argument focused on Foster's race and Ford's data relating to minority-owned dealerships. Similarly, their theory-of-the-case instruction focused squarely and exclusively on their contention that the sales and profit forecast and capitalization requirement were fraudulent in view of the historical performance of *black*-owned dealerships. See Pet. 13-14. There is simply no possibility that the jury's punishment decision was based on suppression of general new-dealer success rates. The fact that they now seek refuge in the off-hand comment of a single witness is an indication of how weak their claim of reprehensibility truly is.

Even putting aside the fact that the "new dealer" theory was not the basis for the verdict, it hardly supports the suggestion that Ford engaged in egregious misconduct. Whether or not a newly appointed dealer is able to turn a profit right away depends on numerous circumstances specific to the dealership in question.[9] Here, respondents were purchasing the assets of a dealership that was profitable historically and whose key personnel had committed to stay on. Thus, there is not the slightest bit of support in the record for the suggestion that Ford knew that *this* dealership would be only marginally profitable. To the contrary, the record reflects that River City Ford earned over $100,000 in

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[9] Although Sperau was a newly appointed dealer, respondents' assertion (Opp. 18) that he had "no experience in the operation of a Ford dealership" is flatly false. See C. 4641, 4833. So too is the implication (Opp. 18) that Ford expected that Foster would be involved in the operation of the dealership. As respondents themselves adduced at trial, Ford considered Foster an "investor only" and expected that the dealership would be operated by Sperau. R. 1887-1888. See also R. 328-329, 342-343, 346, 481, 492, 500, 915, 1082-1083, 1085; C. 4482, 4814.

its first seven months of operations. Pet. App. 13a; R. 585, 982.

3. Respondents make a bewildering argument based on the fact that the prior dealership was highly successful. Opp. 18-19. This argument apparently assumes that, because the dealership already was doing well, it could not do even better and thus could not realistically have been expected to earn a 65.4% return on capital. This theory too is entirely contrived after the fact for the benefit of this Court. In any event, it cannot be squared with the record. It is undisputed that Kitchens' projections took into account respondents' own ambitious plans for operating the dealership. R. 1841-1842, 1861-1862. Moreover, Sperau conceded that he reviewed with Kitchens all of Kitchens' projections and then independently investigated them by visiting the dealership and talking with the general manager. See Pet. 7-8. It is preposterous to suggest that Ford committed a grievous fraud by giving respondents projections that Sperau ultimately concluded were reasonable based upon his own due diligence.

## CONCLUSION

Respondents have tried mightily to make this case look factually messy in order to defeat certiorari. But fabrications do not equate with messy facts. This case squarely frames two of the central problems with modern-day punitive damages litigation: (1) the inferior courts are routinely allowing punitive damages to be imposed for conduct that the defendant could not reasonably have known was punishable; and (2) in evaluating whether punitive exactions are excessive, the courts simply are not distinguishing mundane business transactions from egregious misconduct. This case accordingly presents an excellent opportunity to provide guidance — and discipline — on these important issues. The petition for certiorari should be granted.

Respectfully submitted.

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